



United States Department of the Interior
BUREAU OF LAND MANAGEMENT
Eastern States
20 M Street, SE Suite 950
Washington, DC 20003
<http://www.blm.gov/eastern-states>



In Reply Refer to:
3120 (930) NVM

DEC 12 2018

CERTIFIED MAIL—Return Receipt Requested

Center for Biological Diversity
1212 Broadway #800
Oakland, CA 94612

Sierra Club
2101 Webster Street, Suite 1300
Oakland, CA 94612

Ohio Environmental Council
1145 Chesapeake, Ave., Suite I
Columbus, OH 43212

Heartwood
P.O. Box 1926
Bloomington, IN 47402

Athens County Fracking Action
8474 Terrell Rd
Athens, OH 45701

Buckeye Environmental Network
P.O. Box 824
Athens, OH 45701

Keep Wayne Wild
2350 Indianola Ave
Columbus, OH 43202

DECISION

: December 13, 2018
: Competitive Oil and Gas Lease Sale

PROTEST DENIED

On November 5, 2018, the Bureau of Land Management (BLM) Eastern States Office (ESO) timely received a protest filed on behalf of the above cited parties (Protesters) disputing the inclusion of two Ohio parcels (OHES 059388 and OHES 059389) in the BLM Eastern States December 13, 2018, Competitive Oil and Gas Lease Sale (December Lease Sale). For the reasons stated below, the BLM hereby denies the protest.

PROTESTERS' STANDING

Upon review of the record, the BLM confirms that the Protesters have standing for having participated throughout the NEPA process and submitting their protest timely. This protest response letter will address the hardcopy portion of the protest submission. As noted in the December 2018 lease sale notice, a properly filed notice must be in hardcopy form or by telefax. Electronic and digitally stored documents are not accepted.

DISCUSSION

The Protesters raised several concerns as to why the two Ohio parcels should not be offered at the December 2018 Oil and Gas Lease Sale. The BLM has conducted its due diligence in reviewing the merits of the protest. Below is a more specific discussion of the Protesters' concerns, as well as BLM Eastern States' responses.

A. BLM underestimated the surface disturbance from oil and gas development, including gathering lines.

The BLM estimated surface disturbance from oil and gas development based upon a Reasonably Foreseeable Development Scenario. This Reasonably Foreseeable Development Scenario is BLM's best estimate at the time of NEPA preparation of what surface disturbance could occur. The BLM cannot reasonably assume that an oil and gas lease will result in an application for permit to drill (APD). Sometimes, private entities acquire oil and gas leases to complete a state-required spacing unit and no drilling occurs on that Federal parcel. If an APD is filed, the BLM would conduct a NEPA analysis that takes into consideration the potential cumulative impacts (e.g. related surface disturbance on private lands), while deferring to state authority for activities on private land.

B. BLM has failed to take into account new information about the Buckeye Xpress pipeline that Columbia Gas Transmission plans to replace and expand in the Ironton Unit.

The BLM understands that TransCanada Corporation has submitted the Buckeye Xpress project to FERC. This proposal would affect the Ironton Unit of the US Forest Service. The BLM does not consider this project reasonably foreseeable for the following reasons: 1) To the best of BLM's knowledge, no connector line is proposed at this time between the Marietta Unit (where the BLM is offering parcels for lease) and the Ironton Unit; and 2) the project is a proposal, subject to environmental review in accordance with NEPA; and 3) the FERC has not yet rendered a decision on this proposal.

C. The Leasing EA, that the DNA relies on, failed to analyze impacts of oil and gas leasing on local surface waters and communities near the proposed parcels

The Leasing EA addressed the potential cumulative impacts on surface waters and neighboring communities (socio-economic and environmental justice analysis). If an APD is filed, the BLM will conduct site-specific analysis and provide mitigation measures as appropriate.

D. The Leasing EA, that the DNA relies on, failed to identify over half of the parcels proposed for oil and gas leasing

In compliance with the *National Environmental Policy Act*, the BLM analyzed the potential cumulative environmental impacts for all Federal mineral estate within the Marietta Unit of the Wayne National Forest.

E. The Leasing EA, that the DNA relies on, failed to analyze the impact of oil and gas operations on residents and homes near the lease parcels.

The Leasing EA addressed the potential cumulative socio-economic and environmental justice impacts of oil and gas leasing. If an APD is filed, the BLM will conduct site-specific analysis and provide mitigation measures as appropriate.

F. BLM failed to initiate or complete consultation under Section 106 of the National Historic Preservation Act (NHPA) with respect to the lease parcels and also failed to properly consult with Tribes and the Ohio State Historic Preservation Officer

The BLM conducted required consultation with the Ohio State Historic Preservation Office (SHPO) and tribes. The BLM initiated communication with the Ohio State Historic Preservation Office since early stages of the development of the Environmental Assessment to which the Determination of NEPA Adequacy for the 2018 December Lease Sale tiers. This exchange confirmed, in 2015, that BLM's review of EOIs did not require archaeological surveys with the provision that the act of leasing does not include surface disturbance. Any proposed disturbance will be analyzed if an application to drill is submitted. The BLM initiated consultation with the SHPO and the tribes, once again, on September 26, 2018, and is currently working with the SHPO to resolve any concerns in regard to the parcels. As a result of this process, the BLM added a stipulation (Stipulation #19) to the EOIs that states:

"As a condition of approval for any federal application for permit to drill (APD) which may be filed following issuance of a federal oil and gas lease, the applicant shall hire a professional archaeologist approved by the Ohio State Historic Preservation Office (SHPO) to conduct archaeological/cultural surveys on the Area of Potential Effect (APE) as determined through consultation with SHPO. The surveys shall occur prior to any ground disturbing activities related to the APD. Dependent upon the finding of the surveys, additional consultations may be required. For Federal surface and Federal subsurface estate lands, the surveys shall be conducted in coordination with the US Forest Service in accordance with Notification #1"

Further tribal consultation would occur at the APD stage. For the purposes of leasing, the BLM consulted with the following tribes:

- The Delaware Tribe of Indians
- Peoria Tribe of Indians of Oklahoma
- The Delaware Nation
- Absentee Shawnee Tribe of Indians
- The Shawnee Tribe
- The Eastern Shawnee Tribe of Oklahoma
- The Wyandotte Nation

G. BLM curtailed public involvement by eliminating 30-day comment periods and reducing protest periods, allowing the public only 10 days to review NEPA documentation.

The BLM Eastern States provided a 30-day comment period for the two parcels from August 7, 2017, through September 6, 2017, and the BLM posted the updated DNA on ePlanning on August 8, 2018. There is no regulatory time period for protests. Consistent with current BLM policy, a 10-day protest period was provided on the lease sale notice.

H. BLM failed to disclose why the Ohio parcels being offered in the December 2018 Lease Sale were pulled from the September Lease Sale.

In accordance with 43 CFR 3120.3 1-3, the BLM has the discretion, without issuing a decision document, to withdraw a parcel from leasing for administrative reasons.

I. BLM failed to consult with the USFWS over the impact of its leasing decision on threatened and endangered species, while relying on an outdated biological opinion.

The Forest Service and the BLM have consulted with the USFWS multiple times and have analyzed the potential cumulative effects on threatened and endangered species from oil and gas leasing within the Marietta Unit of the Wayne National Forest. The USFWS, US Forest

Service, and the BLM have developed a suite of stipulations for the protection of threatened and endangered species attached to each EOI and lease if sold.

The Leasing EA details the timelines of the various Section 7 consultations (Pages 18-19):

“The Forest Service completed a Biological Evaluation (BE) and the USFWS issued its Biological Opinion (BO) on November 22, 2005. The BO established a tiered approach to the Section 7 consultation. The programmatic (Tier I) BO (November 22, 2005) covers all the activities described in the 2006 Forest Plan/EIS at a programmatic, non-site-specific level. Because the BLM was a cooperating agency in the 2006 Forest Plan and EIS, the consultation conducted with respect to the 2006 Forest Plan and EIS applies to the Proposed Action analyzed in this EA ... As part of the 2012 SIR, the Forest Service reviewed new information related to hydraulic fracturing and whether there could be additional effects to threatened and endangered species that had not been previously analyzed in the 2006 Plan/EIS. The Forest Service and the USFWS concluded that no further analysis or consultation was needed and that the consultation conducted under the 2006 Plan/EIS was still valid. As the BLM analyzes individual projects pursuant to the Forest Plan, the BLM is responsible for reinitiating consultation and providing the USFWS with additional information; this process is called Tier II consultation. The BLM would submit a Tier II Biological Assessment to the USFWS when it receives an APD, if it determines that potential effects to critical habitat, fish or wildlife could occur.”

As to the Indiana bat, the Leasing EA states that there are no documented hibernacula within the Marietta Unit in Ohio (Page 48):

“The WNF contains one documented hibernaculum, and it is not on the Marietta Unit ... the Athens and Ironton Units most likely contain the most heavily concentrated populations of Indiana bat, based on thorough surveys conducted previously throughout the WNF by the USFWS.”

For the Northern Long Eared Bat, the Leasing EA clearly states BLM reliance on the 4(d) rule of the USFWS. This rule states that in areas of the bat's range that may be affected by white-nose syndrome, incidental take caused by some tree removal and tree-clearing activities, does not need to be prohibited to conserve the bat if conservation measures that protect the bat's most vulnerable life stages are taken. Specifically, the Leasing EA states (Pages 100-101):

“It is possible that tree removal may result in impacts to individual northern long-eared bats. This risk is minimized by the application of lease stipulations designed to protect Indiana bat. The stipulations that pertain to oil and gas leasing on the Wayne National Forest are more restrictive than the requirements provided in the Fish and Wildlife Service's 4(d) rule for northern long-eared bat, and any incidental take of northern long-eared bat would comply with the exemption provided by the 2016 4(d) rule. The 4(d) rule exempts take from tree-removal activities that take place more than one-quarter mile from a known hibernaculum, and it exempts tree removal outside of the pup season (June 1 – July 31). There are no known bat hibernacula on the Marietta Unit.”

Furthermore, the BLM worked directly with the USFWS to identify the species to be considered for potential leasing within the Marietta Unit. As a result of that informal consultation, the BLM Northeastern States District (NSD) prepared a Biological Assessment (BA). The BA concluded that proposed oil and gas leasing was not likely to adversely affect the threatened and endangered species identified by the USFWS.

In addition, the Leasing EA states that Forest Service reasonably decided consultation was not necessary in light of the information provided in the 2012 SIR (Page 173):

“The 2012 SIR was completed to determine if the 2006 Forest Plan/EIS needed to be updated in light of new information regarding hydraulic fracturing. The Forest Service determined that the potential effects associated with hydraulic fracturing and horizontal drilling were not significantly different from those of vertical drilling and that the mitigation measures in place for vertical drilling would suffice for horizontal drilling/hydraulic fracturing.”

As to BLM’s role in this analysis, the Leasing EA explains (Page 177):

“BLM was a cooperating agency on the 2006 Forest Plan/EIS and provided input for the 2012 SIR.... Both the Forest Service and the USFWS concurred that no further analysis or Endangered Species Act consultation was needed at this stage.”

On November 4, 2015, a letter containing a BLM-prepared Biological Assessment (BA) was sent to FWS by the NSD. The conclusion of the Biological Assessment was that proposed leasing, with the protective measures incorporated into the lease terms, was not likely to adversely affect the Northern long-eared bat, Indiana bat, Fanshell mussel, Snuffbox mussel, Sheepnose mussel, Pink mucket pearly mussel, American Burying beetle, Northern monkshood, Running buffalo clover, Small whorled pogonia, and the *Virginia spirea*. The protective measures outlined in the BLM’s Biological Assessment incorporated stipulations and notices found in the US Forest Service 2006 LRMP/EIS and associated Biological Opinion, plus additional measures for protection of Northern long-eared bat hibernacula and requirements to keep wildlife out of tanks.

Consistent with the ESA regulations and guidance outlined in the US Forest Service 2006 LRMP/EIS and associated Biological Opinion, the BLM and US Forest Service would prepare and submit a Tier II Biological Assessment if, subsequent to leasing, an application for permit to drill is filed with the BLM. Again, the protective measures attached to a lease provide the prospective lessee notice that protection of those species must be taken into consideration if an application for permit to drill is submitted to the BLM. Additional consultation with the US Fish and Wildlife Service would be required at that time.

DECISION

After a careful review of the submitted protest, I have determined that all of the protested Ohio parcels as described in the December Sale Notice may be offered at the December Lease Sale. The protest to both Ohio parcels is denied for the reasons described above.

You may appeal this decision to the Interior Board of Land Appeals, Office of the Secretary, in accordance with the regulations contained in 43 CFR, Part 4, and the attached Form 1842-1 (Attachment 2). If you file an appeal, your notice of appeal must be filed in the BLM Eastern States Office, 20 M Street SE, Suite 950, Washington, D.C. 20003, within 30 days from receipt of this decision. You have the burden of showing that the decision appealed from is in error.

If you wish to file a petition (pursuant to regulation 43 CFR 4.21) (request) for a stay (suspension)

of the effectiveness of this decision during the time that your appeal is being reviewed by the Board, the petition for a stay must accompany your notice of appeal. A petition for a stay is required to show sufficient justification based on the standards listed below. Copies of the notice of appeal and petition for a stay must also be submitted to each party named in this decision and to the Interior Board of Land Appeals and to the appropriate Office of the Solicitor (see 43 CFR 4.413) at the same time the original documents are filed with this office. If you request a stay, you have the burden of proof to demonstrate that a stay should be granted.

Standard for Obtaining a Stay

Except as otherwise provided by law or other pertinent regulation, a petition for a stay of a decision pending appeal shall show sufficient justification based on the following standards:

- (1) The relative harm to the parties if the stay is granted or denied;
- (2) The likelihood of the appellant's success on the merits;
- (3) The likelihood of immediate and irreparable harm if the stay is not granted; and
- (4) Whether the public interest favors granting the stay.

Please contact Stephen Mahoney at stephen.mahoney@sol.doi.gov with any further questions.



Karen E. Mouritsen
State Director